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No. 15-415

IN THE

# Supreme Court of the United States

ENCINO MOTORCARS, LLC,

*Petitioner,*

v.

HECTOR NAVARRO; MIKE SHIRINIAN; ANTHONY PINKINS; KEVIN MALONE; AND REUBEN CASTRO,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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## QUESTIONS PRESENTED

Under *Chevron's* two-step framework:

1. Does the Fair Labor Standards Act's statutory overtime-pay exemption for automobile dealership "salesm[e]n, partsm[e]n, or mechanic[s] primarily engaged in selling or servicing automobiles," 29 U.S.C. § 213(b)(10)(A), unambiguously apply or not apply to service advisors?

2. Is the Department of Labor's 2011 notice-and-comment regulation, 29 C.F.R. § 779.372(c), which concluded that service advisors fall outside the salesman/partsman/mechanic exemption, a permissible construction of the statute?

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# BRIEF OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO AS *AMICUS CURIAE* IN SUPPORT OF RESFONDENTS

## INTEREST OF *AMICUS CURIAE*

The INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO ("IAM") is a labor organization of nearly 600,000 members, representing workers across the United States.[1] It represents employees in various industries including manufacturing, aerospace and shipyards. Its particular interest in this case is that it has long represented employees in service departments of automobile dealerships, going back to at least the 1940s. As of this date, the Union represents over 35,000 employees in automotive industries, mainly automobile dealerships, across the country.

The Union's primary representation of employees in automobile dealerships has been service mechanics. Its representation, however, has also included partsmen, service advisors, parts runners, dispatchers, bodymen, lot persons and the many additional classifications who work in the varying configurations in the service departments of different dealers throughout the country.

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[1] No counsel for a party authored this *amicus* brief in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

The Union has been in the forefront of organizing employees in service departments. As a result, through its affiliated District and Local Lodges, the IAM has participated in hundreds of National Labor Relations Board (NLRB) proceedings involving unit determinations concerning mechanics, service advisors and other job classifications in service departments.

The Union's interest in this case is ensuring that service advisors whom it currently represents, as well as those whom it seeks to organize, are not exempt from overtime under the Fair Labor Standards Act, 29 U.S.C. § § 201-219. The IAM is also concerned that any expanded reading of the exemption would affect the many other classifications of employees it represents in service departments. The narrow application of the overtime exemption in 29 U.S.C. § 213(b)(10)(A) is particularly important to this long-term goal of organizing and representation.

Amicus Curiae brings a specific perspective to this Court. Rather than present argument about the meaning of the Fair Labor Standards Act, we detail and explain how the National Labor Relations Board (NLRB), in representation proceedings, has treated service advisors, mechanics and the other members of service departments in various dealerships over the last seventy-five years of reported decisions. While these decisions do not deal with the precise issue before the Court, they provide an even-handed view of the work performed in service departments, how that work is divided amongst classifications, the layout of dealerships, the wages and methods of compensation for various classifications and, of particular interest, the work of service advisors. This

review should assist the Court in understanding the nature of service advisor work and why it makes sense that they are not within the exemption from overtime of the Fair Labor Standards Act (FLSA) that is at issue.

## I. STATEMENT OF THE CASE

Respondents brought an action under the Fair Labor Standards Act, claiming that they were entitled to overtime under federal law. The district court dismissed their claim, and the Ninth Circuit reversed, holding that the exemption in the Fair Labor Standards Act did not apply to service advisors in automobile dealerships. This decision relied, in part, on an interpretation of the Department of Labor.

This case is before the Court without any factual record of what service advisors do in dealerships across the country. The record is limited to the bare allegations of the complaint concerning one dealership.

Under the provisions of the National Labor Relations Act, 29 U.S.C. § 151, the NLRB is authorized to determine appropriate bargaining units for the purposes of collective bargaining. *See* 29 U.S.C. § 159(b).

In making these unit determinations, the NLRB has issued numerous decisions describing the job duties and working conditions of service advisors and other classifications employed in the service departments of automobile dealers. We present analysis from these decisions in support of the Respondents' arguments that the exemption cannot reasonably apply to service advisors and that the Department of Labor's regulation excluding service advisors from the

exemption makes sense both historically as well as within the current configuration of automobile dealerships. *See* 29 C.F.R. § 779.372(c)(1).

## II. SUMMARY OF ARGUMENT

Decisions of the NLRB and Decisions and Directions of Elections of Regional Directors, present a thorough review of job duties and working conditions of employees in automobile dealerships. Because the NLRB is required by statute to make individualized unit determinations each time a question of representation is raised, there is an extensive administrative record examining the operations in automotive service departments from the 1940s to present.

These cases fully explore the job duties of service advisors. The work of service advisors is regularly described as the communication link between customers and the mechanics who service their vehicles. Service advisors are uniformly described as having neither the skills nor tools to perform the servicing function. This undermines the argument of Petitioner that service advisors are engaged in the servicing of vehicles. Pet. Br. 22-35.

Review of NLRB decisions from the 1960s forward show service advisors work in dealerships performing non-mechanic work, managing the process of automobile repair for customers and ensuring that customers are advised of the status of needed repairs and costs associated with the repairs, and all paperwork is completed properly. This undermines the argument of Petitioner that service advisors are salesmen. Pet. Br. 23.

These same decisions describe, in detail, the numerous job classifications in use in service departments and the scope of the job duties associated with these classifications. Lube technicians, lot attendants, car washers, detailers, cashiers, warranty clerks, parts drivers, parts runners, body shop employees and many other job classifications are used in addition to mechanics and partsmen in most dealerships. These job classifications, and the scope of associated duties, do not fit within the FLSA exemption at issue, and these individuals currently enjoy the overtime protections of the FLSA. This undermines the argument of Petitioner that the exemption is meant to be inclusive of all classifications of the parts and service departments engaged in the servicing of vehicles. *See* Pet. Br. 29-31, 36-38 and 39-40.

Given the scope of job classifications used in dealerships in the 1960s, which continues to the present, it is clear that the exemption was not intended to include service advisors. If accepted, the Petitioner's argument regarding the functional integration of service advisors in the servicing of vehicles would result in a *de facto* return to the blanket exemption of 1961 since all employees in the service department are, in some way, part of the servicing process. Contrary to the Petitioner's position, it would be more disruptive to expand the exemption to include more classifications.

Our argument outlines the framework used by the NLRB, the job duties regularly assigned to service advisors, the duties of other employees in service departments and explains why the Department of Labor's

limited reading of the FLSA exemption is consistent with the daily operations of automobile dealerships.

## III. ARGUMENT

### A. THE NATIONAL LABOR RELATIONS BOARD IS TASKED WITH DETERMINING THE APPROPRIATE BARGAINING UNIT FOR PURPOSES OF COLLECTIVE BARGAINING.

Through the NLRB representation process, a wealth of administrative decisions have been issued outlining the job titles, job duties, working conditions and supervisory structures of automotive dealerships. These decisions provide a neutral factual review of dealerships over time.

Under the provisions of 29 U.S.C. § 159(b), the NLRB "shall decide in each case whether, in order to assure the employees the fullest freedom in exercising their rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof. "

The procedure by which these unit determinations are made is also established in the statute. "[T]he Board shall investigate such [representation] petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice." 29 U.S.C. § 159(c).

Although the National Labor Relations Act sets out certain restrictions on determinations of appropriate

bargaining units, the NLRB has historically employed a community of interest standard in determining the appropriateness of any particular unit.

The leading treatise describes the Board's function as follows:

> The Board draws upon the criterion of community of interest in order to determine whether, for example, employees with special craft skills and training should be separated out for purposes of voting and bargaining or whether they should be grouped along with semi-skilled and unskilled employees in an "industrial" unit; whether "production and maintenance" employees should be grouped in a single unit with "white-collar employees" doing technical or clerical work; whether the unit should include only employees working in a single plant, store or office of the employer or whether there should be a grouping of employees in several—or indeed all—of the employer's plants, stores or offices; and whether it is sound to go even beyond the employees of a single employer and to group those employees with persons employed by other employers in the same industry in the same competitive market. In making judgments about "community of interest" in these different settings, the Board will look at such factors as: (1) similarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills and training of the employees; (5) frequency of contact or interchange among the employees; (6)

> geographical proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization.

Robert A. Gorman & Matthew W. Finkin, *Labor Law Analysis And Advocacy* § 5.2, at 103 (2013).[2] *See also NLRB v. Action Auto., Inc.*, 469 U.S. 490, 494 (1985); NLRB, *An Outline of Law and Procedure in Representation Cases* 135-38 (2012).[3]

As a result of consistent application of this established test, nearly all unit determination decisions review the work of the employees in each job classification, the methods of compensation, integration of work, interchange between classifications, hours of work, required uniforms, and other criteria that fall into the traditional multi-factor test.

Prior to 1961, the hearings used to gather the information necessary to make unit determinations were conducted by the Regional Director, and then the record was submitted directly to the Board in Washington for the issuance of a decision. After 1961, the decisions were issued by the Regional Directors subject to review by the Board. The process has been modified recently to speed up and simplify the process but still

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[2] This is the third edition of the text previously known as Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law: Unionization and Collective Bargaining* (2d ed. 2004).

[3] Available at https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/representation_case_outline_of_law_4-16-13.pdf

requires a determination to be made in each case based on its unique facts. 79 Fed. Reg. 74,308 (December 15, 2014) (codified at 29 C.F.R. pts. 101, 102, and 103).

The Board has thus, through its Regional Directors and decisions of the Board on review, considered the placement of service advisors in or out of potential bargaining units sought by unions as part of the representation process. These cases provide a body of concrete facts regarding the work of service advisors and other service department employees. The similarities and differences between service advisors and other employees and the general working conditions of service departments have been described in a manner that should offer some stability and accuracy to an understanding of the work of service advisors.

The records relied on below are the Regional Director decisions and, in some cases, Board decisions involving service advisors and service departments in general.[4] In a few cases, these issues arise in the context of unfair labor practice proceedings involv-

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[4] Before 1961, there are no Regional Director decisions. All cases before May 15, 1961, are decisions of the Board because all hearing records were submitted directly to the Board, which then issued a decision after review of the record. In 1961, the Board delegated the power to hold hearings and issue decisions to the Regional Directors. 29 U.S.C. § 153(b); 26 Fed. Reg. 3885 and 3911 (1961). Thereafter, Regional Directors issued decisions subject to the right of any party to seek review. If review was granted, the Board would then issue a decision. Thus, this brief cites Board decisions before 1961 and primarily Regional Director decisions after 1961. Unless otherwise indicated, those Regional Director decisions were not challenged by way of exceptions to the Board, test of certification, or otherwise. *See* 29 C.F.R. § 102.60-72.

ing service advisors and other members of service departments. These cases are resolved by decisions issued by Administrative Law Judges, which are then reviewed directly by the NLRB. *See* 29 U.S.C. § 160.[5]

In some cases, the Board's determinations as to the appropriateness of a unit have been reviewed by the courts of appeals where employers challenged the bargaining unit in what is called a test of certification. *See* Robert A. Gorman & Matthew W. Finkin, *Labor Law Analysis And Advocacy* § 4.10, at 90-92 (2013). This Court has granted particularly wide discretion to the Board's determination of the appropriate bargaining unit. *See Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947); *NLRB v. Hearst Publ'ns Inc.*, 322 U.S. 111 (1944).

As will be evident from these cases, employers and unions, primarily the International Association of Machinists, have litigated the scope of bargaining units in service departments because service departments contain many different classifications and vary from dealership to dealership. In some cases, the petitioning union has sought to include service advisors in a unit of service department employees with mechanics. In other cases, the union sought to exclude service advisors. In other cases, the employer has

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[5] We cite to cases that are available on the NLRB's website. The Regional Director decisions after 1961 were not published in the official volumes of NLRB Decisions. Regional Director's Decisions and Directions of Election are available through the Board's website at https://www.nlrb.gov/search/cases. Reported NLRB Decisions are available on the Board's website at https://www.nlrb.gov/cases-decisions/board-decisions in addition to Westlaw and Lexis.

sought to include the service advisors when the union has resisted it, or the employer sought to exclude them when the Union has sought to include them. Regardless of which party has taken which position, the result is a decision analyzing the job duties, compensation methods and daily operations in the particular service department.

The variety of positions taken by the parties to these unit determination proceedings makes these decisions helpful and trustworthy to the issue before this Court. In effect, they constitute a neutral record of service department operations and should be treated as an accurate historic description of the work of service departments in general and service advisors in particular. These conclusions are generalized from well over one hundred cases that concern various classifications in dealerships that differ significantly in size, organization and operations.

## B. THE FUNCTION OF SERVICE ADVISORS IS CUSTOMER RELATIONS.

### 1. The Primary Function of Service Advisors is a Communication Link.

A service advisor is a customer service position. The primary duties are to record customer concerns regarding their vehicle on a repair order, to provide an estimate and to keep customers informed on the status of their vehicle's repair or maintenance.

Service advisors:

greet in-coming customers, prepare repair orders, and assign the repair orders to individual [mechan-

> ics] Service advisors are required to have good communication skills and receive special training in dealing with customers The 'advisor' part of their title deals with their relationship with the customer. They do not 'advise' or counsel the mechanics on how to diagnose a problem, what cause to eliminate first, or other technical aspects they merely serve as the link between customers and mechanic.

*McRobert Motor Co. d/b/a Gresham Ford*, 36-RC-6082, at p. 2 (July 25, 2001). The primary responsibility of a service advisor is "to greet customers, to find out what problems the customers are experiencing with their vehicles, and to keep the customers informed about the status of their vehicles during the repair process." *Phil Long European Imports, LLC*, 27-RC-8071, p. 5 (August 24, 2000).

The service advisor position is also described as "a liaison" between the customer and the mechanic. *Autonation Imports of Longwood, Inc. d/b/a Courtesy Honda* ("*Courtesy Honda*"), 12-RC-083701, p. 5 (August 10, 2012); *Performance of Brentwood LP*, 26-RC-063405, p. 24 (September 29, 2011); *Crown Motor Co., Inc., d/b/a Acura of Memphis* ("*Acura of Memphis*"), 26-RC-8613, p. 15 (August 20, 2010). As such, it is not surprising that "customer service is a critical aspect of the service advisor job." *Big Valley Ford, Inc.*, 32-RC-5370, p. 7 (October 14, 2005). The job requires "customer-facing skills" to explain repairs that will be performed to the vehicle. *BMW of West Springfield*, 1-RC-21908, p. 4 (May 24, 2005).

The duties of the service advisor are generally to generate the necessary paperwork for a repair to start,

commonly referred to as a "repair order," and to ascertain the estimated time and cost to complete a repair. *Arbogast Buick, Pontiac, GMC Truck, Inc.*, 9-RC-17854, p. 3 (November 21, 2003). A mechanic diagnoses any problems with a vehicle and conducts a multi-point inspection in the hope of generating additional potential repairs. *Performance of Brentwood*, 26-RC-063405, p. 24. Based on the findings of the mechanic (and not the service advisor), the service advisor contacts the customer and recommends additional repairs. *Big Valley Ford*, 32-RC-5370, pp. 12-13. The customer either accepts or rejects the proposed additional repairs, and either way, the appropriate repair order is generated by the service advisor and provided to the mechanic. *Courtesy Honda*, 12-RC-083701, pp. 7-8. Once the repair is completed, the service advisor contacts the customer to advise that the vehicle is ready for pick-up. *Id.*, p. 8. The completed repair order is then used to compute the billing, and a copy is provided to the customer for her records.

This is generally seen, in modern dealerships, as a customer relations function. *Bradley Chevrolet, Inc.*, 25-RC-10146, p. 4 (November 6, 2002). Even earlier, in 1950, some took the position that service advisors were essentially "clerical workers." *Fuller Auto. Co. d/b/a Fuller Auto. Co. & Fuller Mfg. & Supply Co.* ("*Fuller Auto. Co.*"), 88 N.L.R.B. 1452, 1457 (1950).

### 2. Service Advisors Do Not Sell or Service Automobiles.

The scope of a service advisor's duties does not include mechanic work or automobile sales. Employers have regularly argued to the NLRB that the

only appropriate bargaining unit is the entirety of the service department because "employees are integrally related to the single function of servicing and repairing automobiles." *Fletcher Jones Las Vegas d/b/a Fletcher Jones Chevrolet* ("*Fletcher Jones Chevrolet*"), 300 N.L.R.B. 875, 876 (1990); *Countryway P'ship d/b/a Crown Motors* ("*Crown Motors*"), 14-RC-12430, pp.1-2 (November 12, 2003) (employer argues that all employees in service, body shop, parts and detail departments are all part of the "vehicle repair process"); *Rush Truck Ctrs. of Cal., Inc. d/b/a Rush Truck Ctr., Sylmar*, 31-RC-8102, p. 9 (April 26, 2002). This is parallel to the gloss Petitioner raises in the pending case. Pet. Br. 23. The NLRB regularly rejects this argument and finds distinct units within the service department. Similarly, this Court should reject adding an additional classification of employee to the 29 U.S.C. § 213(b)(10)(A) exemptions.

As found in many decisions, "advisors do not perform vehicle maintenance and repairs." *Courtesy Honda*, 12-RC-083701, p. 36. Service advisors are not qualified to perform servicing work. *Phil Long European Imports*, 27-RC-8071, p. 5. And, "ability to perform repair or mechanical work" is not a job requirement for service advisors. *Sexton Ford Sales, Inc.*, 14-RC-068800, p. 7 (December 8, 2011).

The service advisor is responsible for securing consent from a customer that a recommended additional repair should be performed. This is sometimes referred to as "up-selling." *See Contemporary Cars, Inc., d/b/a Mercedes-Benz of Orlando* ("*Mercedes-Benz of Orlando*"), 12-RC-9344, p. 17 (November 14,

2008) *subsequent decisions* 354 N.R.L.B. No. 72 (2009) and 355 N.L.R.B. 592 (2010), *enforced*, 667 F.3d 1364 (11th Cir. 2012). In some states, like California, a dealership contacts a customer to provide an estimate of costs and receive explicit authorization for a repair before performing any work beyond that which was stated on the original repair order. This is required by statute. *See* Cal. Bus. & Prof. Code § 9884.9.

In most dealerships, service advisors perform no mechanic work. However, in some dealerships, a service advisor may perform minor service work, like testing a vehicle's battery, replacing a wiper blade or changing a license plate bulb as a courtesy to a customer. *Acura of Memphis*, 26-RC-8613, pp. 15-16; *N. Bay Saturn Group, Inc. d/b/a Saturn of Marin* ("*Saturn of Marin*"), 20-RC-17537, p. 5 (July 30, 1999). To the extent a service advisor performs minor mechanical work it "is incidental to their primary duties of greeting customers and preparing the R[epair] O[rder]." *Sexton Ford Sales*, 14-RC-068800, p. 14; *Courtesy Honda*, 12-RC-083701, p. 27. A service advisor would not have the tools or skills to perform more than this incidental work. Further, this time is neither tracked by the dealership nor charged to the customer. *Sexton Ford Sales*, 14-RC-068800, p. 7; *State College Ford Lincoln Mercury, Inc.*, 6-RC-12215, p. 7 (June 11, 2003).

Just as the job duties of service advisors do not include servicing or maintaining vehicles, the duties similarly do not include selling either service or vehicles. The primary function of the job is to serve as the communication link between mechanics and customers. *Howard Orloff Imports, Inc.*, 13-RC-21069, p. 2 (November 10, 2003). Although there is undoubtedly

a sales component, no reported cases describing the job duties of service advisors designate sales as the primary responsibility of the position. In addition, the sales portion of the function has limited discretion. The service advisor does not diagnose a vehicle. *See Mercedes-Benz of Orlando*, 12-RC-9344, p. 16. The service advisor records the customer concerns as a guide to the mechanic, who diagnoses the problem to determine precisely what work is needed and/or suggests repairs or maintenance. The information necessary to make these suggestions comes from two sources: repairs identified by the mechanic or manufacturer provided maintenance menus or service schedules, such as service menus for specified mileages. *Courtesy Honda*, 12-RC-083701, p. 15; *Thomas Motors of Joliet, Inc.*, 13-RC-21966, p. 2 (September 10, 2010); *Mercedes-Benz of Pembroke Pines*, 12-RC-9290, pp. 9-10 (January 9, 2008). As a result, the service advisor serves a reporting function conveying to the customer the diagnosis of the mechanic or the recommendation of the manufacturer.

Although many service advisors are paid on a draw against commission system, the pay plan itself is not determinative since individuals in many classifications in a dealership receive a portion of compensation based on either individual, department or dealership-wide performance. This includes not only mechanics, partsmen and salesmen but also, on occasion, includes dispatchers, detailers, parts drivers, warranty clerks, and bookers.[6] *See Mercedes-Benz of Pembroke Pines*,

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[6] The duties associated with these positions are addressed below.

12-RC-9290, p. 11 (bookers paid on commission); *Tinley Park J. Imports, Inc.*, 13-RC-21270, p. 6 (November 24, 2004) (detailers responsible for recondition the appearance of vehicles paid on flat rate); *Howard Orloff Imports*, 13-RC-21069, p. 4 (dispatchers paid by commission); *Jackson Ford, Inc.*, 7-RC-22545, pp. 5-6 (November 17, 2003) (lube technicians may receive commission); *Champion Fordland, Inc.*, 4-RC-20177, p. 4 (May 8, 2001) (warranty clerk earns salary and commissions); *Michael Stead, Inc. d/b/a Michael Stead's Walnut Creek Ford* ("*Michael Stead's Walnut Creek Ford*"), 32-RC-4789, p. 3 (August 11, 2000) (parts driver and clerical participate in bonus program based on department-wide sales).

Similarly, some of the classifications that are usually thought to be paid on productivity based systems or as a percentage of sales, may be paid hourly. *See, e.g., Sexton Ford Sales*, 14-RC-068800, p. 9 (some body shop repairmen paid hourly, those with higher skill levels paid flat rate); *Wiers Int'l Trucks*, 25-RC-10389, p. 5 (May 21, 2007) *subsequent decision* 353 N.L.R.B. 475 (2008) (service technicians, service advisors and parts associates all paid on an hourly basis); *Michael Stead's Walnut Creek Ford*, 32-RC-4789, p. 3 (service advisors paid hourly with ability to participate in department-wide bonus program).

Additionally, many dealerships have an internal service advisor who only writes repair orders on new cars (the pre-delivery inspection process) or used cars that are being readied for sale. *See, e.g., Thomas Motors of Joliet*, 13-RC-21966, p. 3; *Keldeneri Corp. d/b/a San Leandro Nissan Hyundai Kia*, JD(SF)-10-07 (April 5, 2007). They do not have

contact with any external customers and do not "sell" as the sole "customer" is the dealership itself. *Mercedes-Benz of Orlando*, 12-RC-9344, p. 16. Similarly, if the dealership has an express oil change process, there may be a service advisor assigned only to that part of the operation. *Big Valley Ford*, 32-RC-5370, p. 3. In some cases, the internal service advisor and express lane service advisors may be paid hourly as compared to on a commission basis. *Azure Auto II, LLC d/b/a Findlay N. Volkswagen* ("*Findlay N. Volkswagen*"), 28-RC-160737, p. 3 (October 9, 2015).

### C. DEALERSHIPS IN THE 1960s EMPLOYED MANY POSITIONS IN THE SERVICE AREA BEYOND THE TWO SPECIFIED EXEMPT POSITIONS.

The term "service advisor" is not new to the automotive services lexicon. Although the title "service salesman" had been used in the 1940s and 1950s, usage of that term reduced dramatically by the 1960s and is rarely, if ever, used in dealerships, as reflected in more recent current case law. When Congress was debating the scope of the FLSA exemption, service advisor was a known service department position.

The history and practice of job title usage in NLRB cases supports the position that if Congress intended to include individuals performing the work of service writers or advisors into the scope of the overtime exemption, the language would have included the classification. Dealerships in the 1960s used multiple job titles when referring to their service department employees, and the job title of service writer/advisor

was already in wide-spread use. *See Trevellyan Oldsmobile Co.*, 133 N.L.R.B. 1272 (1961).

For example, in 1965, the Board found the titles of "service writer, line mechanics, new car get ready and new car detail mechanics, used-car mechanics, body-and-fender men, painters and helpers, parts department men, and lubrication, pickup, and delivery men" each to be in use in a single dealership. *See W. R. Shadoff*, 154 N.L.R.B. 992, 993 (1965). Similarly, in 1962, the job titles of service writer, dispatcher, automotive line mechanics, porters, paint and body shop mechanics, new car get-ready, used car make-ready, and parts department were in use. *See Austin Ford, Inc.*, 136 N.L.R.B. 1398, 1399-1400 (1962).

As demonstrated above, through the 1960s, more than just mechanics and partsmen "servicing and repairing customers' automobiles" were working in service departments, and similarly, more than just salesmen were "preparing cars for sale to the public" in either service or sales departments. *See W. R. Shadoff*, 154 N.L.R.B. at 994. The Petitioner's argument that these broad functions define the scope of the FLSA exemption should be rejected. Pet. Br. 28-31. To accept the position would be a return to the 1961 blanket exemption.

The historical use of a variety of job classifications is recorded more than a decade before the 1961 exemption was enacted. In *Fuller Automobile Co.*, 88 N.L.R.B. at 1453, job titles of control clerk, new and used car and truck salesmen, parts panel salesmen, office clerical employees, body shop employees, foremen, service writers, watchman, swing man and

car jockeys were identified as part of the sales and servicing organization.

As the description above shows, the use of multiple classifications, above and beyond those specified in the FLSA exemption, is not limited to the service area. In new car sales, a dealership may employ finance and insurance salesmen in addition to automobile salesmen. *Parker-Robb Chevrolet, Inc.*, 262 N.L.R.B. 402, 410 (1982) (excluding finance and insurance salesmen from unit of automobile salesmen), *review denied on other grounds, Auto. Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983); *Larry Faul Oldsmobile Co., Inc.*, 262 N.L.R.B. 370 (1982) (finance and insurance salesmen who are in new car, used car and lease departments included in unit of automobile salesmen); *see also Cutter Dodge, Inc.*, 278 N.L.R.B. 572, 575 (1986) (excluding outside parts salesmen).

The same analysis can be applied outside of automobile dealerships. Reported cases related to farm implement dealerships are scarce although there are cases dealing with farm implement manufacturers who also sold their implements. In one of the few farm implement dealership cases, the Board had an opportunity to determine the appropriate bargaining unit at a company that was engaged in the "retail sale, service and repair of farm machinery and farm implements." *Missco, Inc.*, 116 N.L.R.B. 1213 (1956). In that case, the only job titles sought by the union were "mechanics, helpers, assemblers, parts employees, truckdrivers, painters, and janitors." *Id.* at 1214. The employer sought to add the bookkeeper and salesmen. *Id.* There were no service advisors, presum-

ably because the position is not necessary at a facility repairing farm implements.

## D. EVERY SERVICE DEPARTMENT INCLUDES MANY NON-EXEMPT CLASSIFICATIONS OF EMPLOYEES.

A modern auto dealership's service and parts department includes many classifications beyond those specifically listed in 29 U.S.C. § 213(b)(10)(A). A review shows the regular usage of at least twenty job titles or functions in a well-staffed service department. Other than mechanics and partsmen, each is outside the FLSA exemption. Dealerships often have other departments, such as lease departments, fleet sales and used car departments, that encompass additional non-exempt classifications.

Dealerships have varying structures of management. There may be a service department head (now often called fixed operations) and various department heads, including in the parts department or even among the service advisors. *See Hall Chevrolet, LLC*, 5-RC-126386 pp. 2-3 (May 22, 2014); *Mercedes-Benz of Orlando*, 12-RC-9344, p. 3; *Clay Chevrolet, Inc.*, 1-RC-21570, p. 2 (December 20, 2002). In general, a service department may be divided into sub-departments: for example, automotive servicing, parts, and body shop. *See Big Valley Ford*, 32-RC-5370, p. 3; *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 2. A fourth sub-department of "new car get-ready" may also be designated. *See Austin Ford, Inc.*, 136 N.L.R.B. at 1399. Some dealerships have service, sales, parts and body shop departments, each with their own supervisor. *Fairfield Ford*, 9-RC-

17713, p. 2 (October 29, 2002) *subsequent decision* 340 N.L.R.B. No. 9 (2003) *review denied, enforced,* 116 Fed.Appx. 601 (6th Cir. 2004).

As a result of these various organizational structures, it is difficult to apply a "one size fits all" approach to the variety of ways in which a dealership may be organized or job duties divided.

### 1. Additional Classifications of Service Department Employees

A service department requires a multitude of jobs to be performed for a customer to have a positive experience and a vehicle to be repaired efficiently. Most of these jobs are unskilled and well outside the scope of any FLSA exemption.

The most common classification inside the service department is a mechanic, frequently referred to as a service technician. *Phil Long European Imports*, 27-RC-8071, p. 3, n. 3. The mechanic is responsible for vehicle repair and maintenance. This is a skilled position, and, under Board law, the mechanics on their own may form a craft unit, distinct from other dealership employees based on their skill and training. *Courtesy Honda*, 12-RC-083701, pp. 25-26. However, over time, the skills and function of mechanics have changed. Now, most parts are replaced rather than repaired. *Clay Chevrolet, Inc.*, 1-RC-21570, p. 3. Also, based on the increase in electronic components in vehicles, one of the most frequently used "tools" for a mechanic is a diagnostic computer. *Courtesy Honda*, 12-RC-083701, p. 11. Mechanics usually have their own tools and tool boxes. The value of these tools and box can exceed $50,000. *Jackson Ford*, 7-RC-22545, p. 4; *Oliver C. Joseph, Inc.*, 14-

RC-12830, p. 8 (August 12, 2011). Mechanics earn certifications from either the manufacturer or the National Institute for Automotive Service Excellence (ASE). *Fletcher Jones Chevrolet*, 300 N.L.R.B. at 875; *Performance of Brentwood*, 26-RC-063405, p. 10; *Big Valley Ford*, 32-RC-5370, p. 6; *Saturn of Marin*, 20-RC-17537, p. 4. No one else in the dealership does the work of the mechanic, and the mechanic does not do the work of any other classification. *Fairfield Ford*, 9-RC-17713, p. 3. This makes sense because of the skill sets involved and the higher wages of mechanics.

In addition to highly-trained mechanics, there are likely to be lesser skilled technicians known as lubricators, lube technicians, express techs, or lube and oil technicians. These individuals do not bring their own tools to work. Their work is frequently limited to oil and other fluid changes, changing belts or filters, rotating tires or other simple servicing work. *Fletcher Jones Chevrolet*, 300 N.L.R.B. at 876; *Courtesy Honda*, 12-RC-083701, p. 14; *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 3. Lube technicians are generally paid on an hourly basis and are not exempt from overtime. *Fletcher Jones Chevrolet*, 300 N.L.R.B. at 876; *Junction Buick Pontiac GMC-Truck*, 8-RC-16059, p. 4 (June 30, 2000). These employees are often employed in "quick lane" or "quick service" areas, geographically separate from the rest of the service department. *Academy LLC d/b/a Phil Long Ford of Chapel Hills* ("*Phil Long Ford of Chapel Hills*"), 27-RC-8320, p. 4 (May 21, 2004).

There may also be pre-delivery inspection technicians who do not perform mechanical work but simply inspect and prepare new vehicles for customers to

pick up. *Royal Gate Dodge, Inc.*, 14-RC-12420, pp. 6-7 (February 24, 2003). This includes inspecting the vehicle upon its arrival, removing any protective coatings used in shipping, placing floor mats in vehicles, installing dealer logo license plate holders and the like. This position is sometimes referred to as a "get ready technician" or "new car cleanup employee." *Fletcher Jones Chevrolet*, 300 N.L.R.B. at 876; *Dick Bullis, Inc. d/b/a Dick Bullis Chevrolet* ("*Dick Bullis Chevrolet*"), 176 N.L.R.B. 158, 158 (1969); *Performance of Brentwood*, 26-RC-063405, p. 23; *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 4. In some dealerships, this function is filled by an "internal technician" who performs pre-delivery inspections on new cars and used cars acquired by the dealership. *Acura of Memphis*, 26-RC-8613, p. 13.

The pre-delivery inspection work may also be performed by a "detailer." *Tinley Park J. Imports*, 13-RC-21270, p. 6. But a detailer may also refer to an individual who provides a deep clean and wash to a vehicle and repairs minor paint scratches for either existing customers or in preparation for selling a pre-owned vehicle. *Performance of Brentwood*, 26-RC-063405, p. 19; *Mercedes-Benz of Orlando*, 12-RC-9344, p. 14; *Saturn of Marin*, 20-RC-17537, p. 4. Detailers are paid on an hourly basis. *Oliver C. Joseph*, 14-RC-12830, p. 12; *Saturn of Marin*, 20-RC-17537, p. 7 There may also be a car washer or wash rack employee who washes cars that have been serviced before the vehicle is returned to the customer. *Sexton Ford Sales*, 14-RC-068800, p. 8.

Some dealerships will have a dispatcher who keeps track of the work and assigns the work to the me-

chanics depending on the nature of the work and the skills of the mechanics. *Fairfield Ford*, 9-RC-17713, p. 4. In older parlance, they were known as "towermen," inherited from other settings where some sat in a tower to monitor the flow of work. *See Dick Bullis Chevrolet*, 176 N.L.R.B. at 158. Other dealerships may call this position a "workflow coordinator." *Performance of Brentwood*, 26-RC-063405, p. 26. This individual may have no mechanical certifications but may earn commission off of the total labor sold in the service department. *Sexton Ford Sales*, 14-RC-068800, p. 8. In some dealerships, the service advisors may serve this function. *Sacramento Auto. Ass'n, Valley Motor Car Dealers Council*, 193 N.L.R.B. 745, 746 (1971); *Q&S Auto., LLC*, 32-RC-5403, p. 10 (March 3, 2006).

A dealership may also employ a quality control person. This person reviews repaired vehicles to ensure the work was performed correctly. He does not usually perform his own repair work and may have limited mechanical knowledge. *Fletcher Jones Chevrolet*, 300 N.L.R.B. at 875. This individual can be paid hourly and receive overtime. *Life Quality Motor Sales, Inc.*, 29-RC-9173, pp. 26-28 (February 23, 1999).

Some dealerships employ an appointment taker, also known as a service appointment coordinator or scheduler. *Courtesy Honda*, 12-RC-083701, p. 17; *Mercedes-Benz of Orlando*, 12-RC-9344, p. 5; *Life Quality Motor Sales*, 29-RC-9173, p. 11. Like the name suggests, an appointment taker schedules service appointments for customers calling the service department. This is mainly a clerical function. It is paid on an hourly basis and entitled to overtime

compensation. *Life Quality Motor Sales*, 29-RC-9173, p. 12.

A service department may have clerks and cashiers. The cashiers accept payment from customers and may file documents and/or pick up phones for the service department. *Phil Long European Imports*, 27-RC-8071, p. 2, n. 2; *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 4. Clerks process paperwork associated with repairs. Some clerks are warranty clerks, which means they administer warranty payments from manufacturers. *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 4. This may also be referred to as a warranty administrator. *Courtesy Honda*, 12-RC-083701, p. 2. Both clerks and cashiers are generally hourly, non-exempt positions but occasionally are salaried. *Acura of Memphis*, 26-RC-8613, pp. 17-18 (hourly); *Crown Motors*, 14-RC-12430, p. 6 (same); *Life Quality Motor Sales*, 29-RC-9173, pp. 29-31 (cashiers and warranty clerks both hourly, non-exempt); *but see Fairfield Ford*, 9-RC-17713, p. 3 (salaried).

There may be a "booker" who "books" or closes repair orders and ensures that technicians are properly paid under the flat rate pay system. *See Mercedes-Benz of Orlando*, 12-RC-9344, pp. 7, 20. This job may be referred to as a "flagger" in reference to the flat rate hours "flagged" by a mechanic. *Sexton Ford Sales*, 14-RC-068800, p. 8. There may even be a file clerk responsible for the retention of paperwork. *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 4; *Life Quality Motor Sales*, 29-RC-9173, p. 32.

There are also porters, lot porters, valets, or car jockeys. *Pflueger Auto Group, LLC*, 37-RC-4120, p.

7 (November 21, 2005); *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 3. Their main function is to move vehicles either from the customer service entrance of the dealership to a mechanic's stall or a lot, or from the lot to a stall or back to the customer. These employees also help to maintain cleanliness in the service area. *Phil Long Ford of Chapel Hills*, 27-RC-8320, p. 10. A porter may also top off fluids, such as windshield wiper fluid or antifreeze. *Courtesy Honda*, 12-RC-083701, p. 6. They are paid on an hourly basis and are eligible for overtime. *BMW of West Springfield*, 1-RC-21908, p. 7; *Junction Buick Pontiac GMC-Truck*, 8-RC-16059, 4. A car may also be moved by a car cleaner or washer to facilitate the cleaning of the car. Regardless of the scope of these utility people, this is generally an hourly, non-exempt position. *Acura of Memphis*, 26-RC-8613, p. 17; *Life Quality Motor Sales*, 29-RC-9173, pp. 10-11.

The dealership may also employ a "shuttle driver" or "courtesy driver" who is responsible for transporting customers to and from the facility. *Courtesy Honda*, 12-RC-083701, p. 2; *see Mercedes-Benz of Orlando*, 12-RC-9344, p. 22. This is an hourly position. *Mercedes-Benz of Pembroke Pines*, 12-RC-9290, p. 11. In a large dealership, there may also be a service greeter who directs customers to the appropriate service advisor. *See Mercedes-Benz of Orlando*, 12-RC-9344, p. 5.

Although mechanics are generally required to keep their own work areas clean, most dealerships either employ janitorial staff or contract with an outside agency to provide on-going cleaning services. If em-

ployed directly by the dealership, the janitor is usually housed within the service department even if her duties extend into the sales areas. *See Country Ford Trucks, Inc.*, 32-RC-4617, p. 3 (June 16, 1999) *subsequent decision* 330 N.L.R.B. 328 (1999), *review denied*, 229 F.3d 1184 (D.C. Cir. 2000). This job is hourly and non-exempt. In some dealerships, the individual performing this work may be called a maintenance employee, and the job may also include facilities or machinery maintenance. *Frank Buck Motors d/b/a Pocono Peterbilt* ("*Frank Buck Motors*"), 4-RD-2121, p. 4 (November 13, 2007).

### 2. Classifications in the Parts Department

The service department may or may not include the parts department. The modern parts department is generally staffed by partsmen. The partsman may be called a retail or wholesale parts counter employee or a parts advisor. *Courtesy Honda*, 12-RC-083701, p. 2; *Phil Long European Imports*, 27-RC-8071, p. 7. A partsman generally works at one of two counters: the back counter, which opens to the shop where the mechanics work or the front counter, which opens into the dealership to an area where customers may purchase accessories or parts that will not be installed by the dealership. *Michael Stead's Walnut Creek Ford*, 32 RC-4789, pp. 2-3. These individuals take parts orders from mechanics, members of the public or outside companies (including body shops and independent repair shops) and provide the parts to the requesting party. *Courtesy Honda*, 12-RC-083701, p. 20. In dealerships that maintain a body shop, there may be a third counter specific to the parts necessary for the body shop. *Hall Chevrolet*,

5-RC-126386, p. 14. Historically, partsmen may have had mechanical responsibilities in repairing parts, but recent unit determination decisions do not reference any mechanical tasks associated with the job. *Compare Austin Ford*, 136 N.L.R.B. at 1400 *with Courtesy Honda*, 12-RC-083701, pp. 19-20.

In a large parts department, there are other employees in addition to traditional partsmen. The stocker, stockroom clerk, or shipping and receiving employee, confirms receipt of ordered parts, stores incoming parts and re-packages used parts for recycling, return to the manufacturer or other disposal. *See Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 4; *Michael Stead's Walnut Creek Ford*, 32-RC-4789, pp. 2-3. In some dealerships, the shipping and receiving clerk is required to operate a forklift for the storage of parts. *Courtesy Honda*, 12-RC-083701, p. 20. These individuals may also be called warehouse employees. *Frank Buck Motors*, 4-RD-2121, p. 5. This is generally an hourly paid position. *Pflueger Auto Group*, 37-RC-4120, p. 11; *Life Quality Motor Sales*, 29-RC-9173, p. 8.

A parts delivery driver is used when a part is not in stock at the dealership. The parts driver may pick up a needed part from an offsite warehouse maintained by the employer, another dealership or a parts retailer. Similarly, the driver may deliver parts to another dealer or repair shop. *Courtesy Honda*, 12-RC-083701, p. 21. This is an hourly position. *Sexton Ford Sales*, 14-RC-068800, p. 11; *Pfleuger Auto Group*, 37-RC-4120, p. 11.

Some dealerships employ a parts runner who delivers parts inside the shop from the partsman to the me-

chanic. In some dealerships, this individual is the "parts inventory control associate." *See Mercedes-Benz of Orlando*, 12-RC-9344, p. 7. This is an hourly position. *See Findlay N. Volkswagen*, 28-RC-160737, p. 3.

Some dealerships employ an administrative assistant, cashier or clerical dedicated to the parts department. *See, e.g., Michael Stead's Walnut Creek Ford*, 32-RC-4789, p. 3. Alternatively, there may be a parts warranty clerk. *Payton-Wright Ford, Inc.*, 16-RC-10539, p. 7 (November 24, 2003). The parts driver, runner, clerk and administrative assistant are hourly, non-exempt positions. *Michael Stead's Walnut Creek Ford*, 32-RC-4789, p. 3.

### 3. Classifications in the Body Shop

Some dealerships maintain a body shop as part of the service department. A body shop, generally in a separate area, is used for painting, frame adjustment, and cosmetic repairs. *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 6. This may also be referred to as a collision center. *Payton-Wright Ford*, 16-RC-10539, p. 1. Employees of the body shop repair vehicles but do not service vehicles within the terms of the FLSA exemption. Some of the job titles are parallel to the traditional service department, but the function is different.

A body shop technician will do collision and paint repair work. They straighten metal, utilize body filler and grinders to repair damage, smooth and sand repaired areas, and match paint. These employees may be paid on a flat rate basis or receive hourly pay. *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 6 (flat rate pay); *Life Quality Motor Sales*, 29-RC-9173,

p. 6 (hourly pay). This is a different skill set and craft from the automotive mechanic. *Big Valley Ford*, 32-RC-5370, p. 13.

The body shop may include an automotive painter to re-paint those sections of the vehicle that have been repaired. This work can be performed in a paint booth and completed with a spray gun. *Sexton Ford Sales*, 14-RC-068800, p. 10. This individual may also repair sheet metal and match paint. This position may be paid based on revenue produced. *Id.*; *Arbogast Buick, Pontiac, GMC Truck*, 9-RC-17854, p. 7 It could also be paid as an hourly wage with an incentive for work produced. *Royal Gate Dodge*, 14-RC-12420, p. 10. The painter may have an hourly paid assistant. *Sexton Ford Sales*, 14-RC-068800, p. 11.

The body shop may employ a detailer who cleans, washes, waxes and buffs cars but does not perform body work. *Life Quality Motor Sales, Inc.*, 29-RC-9173, p. 7. This detailer would be separate from the service department detailer or car washer. *Bradley Chevrolet*, 25-RC-10146, pp. 5, 6.

Body shops have an "estimator" who performs some of the functions of a service advisor. *Payton-Wright Ford*, 16-RC-10539, p. 3. The estimator provides an estimate on the cost of body repair and the expected date of the return of the car to a customer. *Hall Chevrolet*, 5-RC-126386, p. 12. Frequently, these estimates are prepared for insurance companies. *Royal Gate Dodge*, 14-RC-12420, p. 9. There is no sales function in preparing estimates.

There may be a separate porter and secretary designated for the body shop department. *Crown Mo-*

*tors*, 14-RC-12430, p. 6. Both of these are hourly positions. *Id.* at p. 7

## E. THE DIVERSITY OF JOB FUNCTIONS IN A DEALERSHIP SUPPORTS A LIMITED AND NARROW READING OF THE OVERTIME EXEMPTION.

Dealerships vary dramatically, and the roles of mechanics and partsmen are some of the few constants. Because of the diversity of functions of other classifications employed in a dealership, the exemption should be read as written, including only the specified classifications of mechanics and partsmen. Any other approach would exclude many classifications from the FLSA protections they now enjoy.

The justification provided for partsmen and mechanics to be exempted from the FLSA overtime requirements stem from a potential for on-call work to be performed at the site of a disabled vehicle including trucks and farm implements. *See* Resp. Br. 32-35. This is particularly true in the legislative history connected to partsmen and their role in maintaining farm implements. *Id.* Putting aside changes in the automotive, truck and farm implement industries and the question of whether the rationale for the exemption still holds true, the rationale never was applied and would not hold true for service advisors, lube technicians, warranty clerks, lot porters, detailers, parts stockmen, parts runners, bodymen, painters or any other employee in a service department. Nonetheless, the Petitioner argues that service advisors be read into the statute based on either their functional integration in the servicing of vehicles or their work

selling the servicing of vehicles. Pet. Br. 25, 27 Many of the above classifications would be swept into the exemption by adopting that rationale.

Contrary to the Petitioner's suggestion, designating service advisors as exempt is not necessary to maintain simplicity in pay plans for the service department. Service departments already have a multitude of pay plans to address the various categories of employees. Mechanics and body shop technicians can be paid on varying flat rate plans, but a different flat rate plan applies to the service shop than the body shop. Some employees, including parts runners, warranty clerks and dispatchers may receive a bonus based on department-wide sales. Some warranty clerks receive a monthly salary. Some bonuses are based on customer satisfaction in addition to gross or net sales of parts, labor or both.

These complex pay systems are managed electronically and are frequently outsourced to payroll companies such as ADP and PeopleSoft. Regardless of the exemption status of service advisors, a typical dealership will continue to employ a multitude of exempt and non-exempt employees in the service department. *See UAG-Steven Creek II, Inc. d/b/a Audi Stevens Creek*, 32-RC-108320, p. 4 (July 29, 2013) (service department employs service technicians, service advisors, greeter/porters, dispatcher, warranty clerk, car washer/detailers, and shuttle drivers); *Courtesy Honda*, 12-RC-083701, pp. 1-2 (parts and service department includes service technicians, lube technicians, service advisors, appointment taker, cashier, service porter, warranty administrator, service support individual, retail parts counter employee, wholesale parts

counter employee, parts shipping and receiving employee, parts floater employee and parts driver); *Payton-Wright Ford*, 16-RC-10539, p. 1 (body shop, parts and service department includes service technicians, quick lube technicians, service advisors, body or collision center technicians, parts back counter employees, stocker, warranty parts employee, parts driver, parts warranty clerk, bookers, aftermarket sales, parts front counter employees).

Petitioner's legal position expands the three exemptions into many disparate classifications. An estimator serves as the functional equivalent of a service advisor in the body shop. The estimator serves as the go-between for the customer (or the insurance company) with the body shop technician. The estimator neither works on the vehicle itself nor does the position have an explicit sales component: there is usually no work to "up-sell." Either the dent or damage is going to be fixed or not. If the service advisor is read into the exemption, does the estimator get shoehorned into the exemption as well based on the similarities to service advisors?

A lube technician has neither the earning potential of the mechanic (as she is generally paid hourly without a production bonus) nor the skill set that would result in being required to perform work away from the dealership. A broad reading of the exemption would encompass this lower skilled position which, while engaged in service on vehicles, is not a true "mechanic."

A warranty clerk may earn a portion of his compensation based on overall sales of service. The clerk does not service vehicles nor does he have direct

communication with the customer to sell additional service. A bonus is calculated on the total warranty work that is ultimately approved by the manufacturer. In that sense, he is selling the service that has been performed to the manufacturer. No rational reading of the exemption, however, should include the warranty clerk.

Similarly, the term "partsman" is applicable only to the parts advisor/parts counter person. To expand the exemption to include the parts warehouseman, parts driver or parts runner, or parts cashier/clerk strays from the original meaning of the language. The legislative history shows that partsmen were included in response to concerns regarding maintenance of farm implements, where a part may have to be fabricated for a quick repair. Resp. Br. 36-37. It would be exceedingly rare for a partsman in an automobile or truck dealership and repair facility to encounter a similar circumstance. It is unheard of for a parts warehouseman to be dragged out of bed to find a part in a department that is open for set hours during the day. Nonetheless, if all persons integral to the servicing of an automobile were covered under the exemption, the parts warehouseman would lose the benefit of the overtime to which he is currently entitled.

A dispatcher is essentially a middleman between the service advisor and the mechanic, determining which available mechanic is best suited to perform a particular repair. If the service advisor is included in the exemption and the mechanic is included in the exemption, the dispatcher, as the functionally integrated link between advisor and mechanic, would be

similarly included notwithstanding the dispatcher's lack of work servicing a vehicle or selling services to customers.

In some dealerships, an individual may hold multiple positions. For example, at the Ford dealership in State College, Pennsylvania, one employee was found to spend 25% of her time as a service advisor, 50% of her time performing quality checks and the remaining 25% of her time processing warranty claims. *State College Ford Lincoln Mercury*, 6-RC-12215, pp. 7-8. Unlike the remaining service advisors at the dealership, who were paid salary with a bonus based on parts sold, she was paid hourly for her service advisor work and only earned a bonus based on the number of satisfied customers to whom she spoke. *Id.* Under the Petitioner's analysis, this individual would be excluded from the FLSA protection of overtime based on her service advisor work.

These examples highlight the slippery slope of expanding the limited language of 29 U.S.C. § 213(b)(10)(A) to include job titles beyond salesman, partsman and mechanic. Given the variations in structure and job duties between dealerships found in all of these NLRB cases, a narrow reading is required. The Department of Labor has the mandate, expertise and knowledge to review job duties in a broad number of dealerships. Rather than the Court relying on one isolated workplace, the DOL, which is better suited for the task, should be setting policy on this matter and its interpretation should be honored.

## IV. CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully Submitted,

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